

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DISTRICT

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:
JEREMY HUNT, et al., :
:
 Plaintiffs, : Civil No. 18-02485-PX
:
 v. :
:
ALDI, INC., :
:
 Defendant. : Greenbelt, Maryland
:
- - - - - x April 4, 2019

TELEPHONE CONFERENCE

BEFORE: THE HONORABLE PAULA XINIS, Judge

APPEARANCES: GREG SWEGMAN, Esq.
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I N D E X

	<u>Page</u>
Preliminary Matters	3
Comments by George Swegman, Esq. Attorney for the Plaintiffs	4
Comments by Louisa Johnson, Esq. Attorney for the Defendant	14
Ruling by Judge Xinis	17

Inc

3

1 P R O C E E D I N G S

2 (Whereupon, at 10:04 a.m., the telephone conference
3 began.)

4 THE COURT: Are we recording?

5 THE CLERK: We are Your Honor, the matter now
6 pending before the Court is civil action number PX-18-02485,
7 Jeremy Hunt et al versus ALDI, Incorporated. The matter
8 comes before this Court for a telephone conference. Counsel
9 please identify yourselves for the record.

10 MR. SWEGMAN: Thank you. This is George Swegman,
11 counsel for the plaintiffs.

12 MS. JOHNSON: And this is Louisa Johnson. Counsel
13 for defendant, ALDI, Inc.

14 THE COURT: All right, did you say your name was
15 Ms. Johnson? Did I get that right?

16 MS. JOHNSON: Yes, ma'am.

17 THE COURT: Okay great. Anyone else on the line
18 with us?

19 MR. SWEGMAN: There is no one on the line -- this
20 is George Swegman, counsel for the plaintiff, no one on the
21 line here other than myself.

22 MS. JOHNSON: And this is Louisa Johnson, counsel
23 for defendant, there is no one else on the line for the
24 defendant.

25 THE COURT: Okay, great. Okay, counsel, we are

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1 brought together by the letter that I received at ECF 36 from
2 the defense -- I am sorry, 33, and then the plaintiff's
3 response at 36. So let me start with this, I just want to
4 understand one thing factually. The letter in question that
5 went out on the law offices letter head, references that
6 additional information can be found at the website.

7 Mr. Swegman can you navigate me through where I can
8 find that information? I want to have the full picture in
9 front of me.

10 MR. SWEGMAN: Oh boy, Your Honor, you are asking
11 the wrong person that information. Had I known that was
12 going to be your first question, I would have had my
13 paralegal in with me because I am a real --- when it comes to
14 the computer and a website. And he does pretty much
15 everything for me.

16 THE COURT: Well, I -- right now I put the website
17 in. So I am in the position of someone receiving this
18 letter. And I don't see anything on the cover page. So then
19 I go to cross action because this is one of them and you do
20 have in the drop down menu, you have wage an hour. So I go
21 to that.

22 MR. SWEGMAN: Right.

23 THE COURT: And this case is not listed. So there
24 is Apex, Tallinn, Althus, UMMS, Insight and Landry.

25 MR. SWEGMAN: And it should be listed. Now you got

1 me questioning where we are in this thing.

2 THE COURT: Right.

3 MR. SWEGMAN: Okay.

4 THE COURT: If that is where it --- and if it is
5 not there, I wanted to hunt it down because if a person was
6 receiving this, they would have access to this information
7 and right now --

8 MR. SWEGMAN: Sure.

9 THE COURT: -- my concern is that you know, what
10 was -- was it there and removed? And what does that tell me?
11 Or was it never there to begin with? And what does that tell
12 the receiver of the letter?

13 MR. SWEGMAN: Or, the other possibility is there
14 may be a different way to approach it on that site? And I
15 can't answer any of those questions.

16 THE COURT: Yes, well it might be important at some
17 point to learn that because I don't see another way to
18 approach it. Your -- Your subject matters do not -- you
19 know, about --- areas, these are practice areas. Which don't
20 include class actions. If I -- no, results class actions is
21 the only drop down menu. It takes me to wage an hour. It
22 is not a toxic(sic) tort or defective product. I go to wage
23 an hour --- this case.

24 MR. SWEGMAN: Your Honor --

25 THE COURT: So you have got --

1 MR. SWEGMAN: -- absolutely should be there.

2 THE COURT: -- so we got a problem with the problem
3 here. Okay.

4 MR. SWEGMAN: Yes, we do.

5 THE COURT: Just to let you know. Now, the
6 defendant's position is that this letter essentially
7 constitutes advertising and because it is post filing of this
8 law suit, it is also effectively an end run around the opt in
9 process. And the defendants have requested in document
10 production and in interrogatories information relevant to
11 this. If I am getting this -- the plaintiff's current
12 position, you do concede that it is advertising?

13 MR. SWEGMAN: Absolutely. There is no question
14 that it is advertising. And I don't know if you have
15 received it but I sent you a short note and copied it to
16 counsel for the defendants and I am sorry -- George Swegman,
17 I was instructed to start every statement with my name and I
18 failed to do that. But last night I sent over copies of the
19 envelopes in which these letters were mailed out.

20 And it clearly states advertisement on the front of
21 the envelope. The reason I sent that was it is part of the
22 argument with respect to the issue of has notice been
23 received? My understanding is that well over 60 percent of
24 envelopes sent out like this that clearly state advertisement
25 on the outside of the envelope never get opened or read. But

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1 that being said --

2 THE COURT: I mean, I think the plain language of
3 19307.3 references advertising on the outside of the
4 envelope. I have not received to supplement. So obviously
5 looking at the letter, it was very concerning. I know as a
6 common practice the letters often do say advertising as well
7 for this very reason. Because --- separated her letters and
8 that this letter is -- I got to tell you it is troubling to
9 me because it does in sum and substance constitute and end
10 run around the opt in process.

11 When -- you are telling me that if they sign here,
12 they are authorizing consent of the filing and prosecution of
13 the FLSA action in their name and on behalf of all persons
14 similarly situated. That is ultimately going to be my call.
15 And --

16 MR. SWEGMAN: Yes, it is.

17 THE COURT: -- yes, so you -- these letters
18 basically ask for someone to sign and sign up potentially
19 without ever having spoken to anyone about this case, which
20 is the second problem? So I am not quite sure whether --
21 well let me say this, you don't yet have because you have
22 said they are advertising, you do not have an attorney client
23 relationship with the individuals in the first instance?
24 These are folks who you are soliciting to sign up.

25 MR. SWEGMAN: That is correct.

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1 THE COURT: To the -- and to the extent that the
2 defense wishes to see that list especially in light of
3 attending discovery process on conditional certification, I
4 don't see a problem with that. What exactly is the problem
5 with the defendants receiving the documents concerning the
6 communication --- the list of the people who were sent them?

7 MR. SWEGMAN: Well with respect to the stated
8 reasons why they feel that is relevant, I would simply say
9 this. They are arguing that this is or could stand in the
10 stead of a notice, but at the same time they clearly indicate
11 and I would be the first to admit that these are not proper
12 notices on a conditional cert. I have negotiated a number of
13 those and they -- these letters do not meet the requirements
14 of those notices. Which is why we list them as advertising,
15 not as a court notice or anything else.

16 Now -- I understand --

17 THE COURT: Right, I get that -- I understand that.

18 MR. SWEGMAN: -- Okay --

19 THE COURT: But I am still confused as to why the
20 defendants cannot receive in discovery about putative(sic)
21 class certification, the individuals who received these
22 letters because at the end of the day I am going to figure
23 out what this class even conditionally looks like and what
24 the notice should look like. I think it is relevant that an
25 opening salvo has already been mailed to a particular

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1 category of individuals who you believe may constitute a
2 putative class. I mean, you chose to do this after --

3 MR. SWEGMAN: We did.

4 THE COURT: -- so you got to expect that if the
5 defendant gets wind of it during conditional certification,
6 they are going to want to know the universe of solicitations.

7 MR. SWEGMAN: Well, I am not sure that the universe
8 of solicitations is relevant for the purposes of what -- what
9 they are arguing in -- I mean, the rationale that they put
10 forward for needing this information is that the people on
11 that list would not need a redundant notice of certification
12 of a collective. And --

13 THE COURT: Well, I may not --

14 MR. SWEGMAN: -- Your Honor, that is simply not the
15 case.

16 THE COURT: -- well, Mr. Swegman, I may not buy
17 that at the end, right? That just because they received a
18 letter which is deficient under FLSA to give proper notice,
19 these individuals should not receive a letter later. But
20 that is a legal argument that is going to be made after -- if
21 they make it at all after the fact is determined.

22 MR. SWEGMAN: Right.

23 THE COURT: There is still a whole of gray in
24 between about what notice will look like that this initial
25 solicitation may be relevant for. So just because something

1 is relevant in discovery or on conditional certifications
2 doesn't mean that I am going to buy the defendant's argument
3 in the end. So let me say that.

4 MR. SWEGMAN: Okay and I understand --

5 THE COURT: Yes, their smaller point though or
6 their secondary point which is it is relevant to conditional
7 certification, I do credit. That is -- at least that is
8 where I am right now. You haven't convinced me otherwise.

9 MR. SWEGMAN: Okay. Well, I would submit under the
10 circumstances that the -- I am not sure quite frankly where
11 the burden would lie in terms of convincing but I am --

12 THE COURT: Well, the defense --

13 MR. SWEGMAN: -- somewhere --

14 (Whereupon, both parties are speaking simultaneously.)

15 THE COURT: -- the defendants have asked for it and
16 you have objected, if I understand it right, your initial
17 objection was attorney client privilege which not on the
18 table anymore. Your second objection is it doesn't -- it is
19 not relevant and to the extent that I don't credit your
20 arguments, it is your burden because this is all about --
21 here is the thing is, the big elephant in the room is this is
22 all about conditional certification of a particular class and
23 you have already sent out one solicitation which basically
24 does in the end run around the very process that we are
25 engaging in.

1 I just haven't authorized it. So then they are
2 going to get another notice of some form or substance maybe
3 if I certify the class that will look similar --

4 MR. SWEGMAN: Completely different.

5 THE COURT: -- or different. Well, we don't --
6 you know, that is the point though. Since you have already
7 gone out there and done this, the defendants are entitled to
8 know just what the ramifications of it are and at the end of
9 the day it may not make a difference. But you know, we don't
10 know in the end of the day legally whether it is going to
11 have any impact.

12 MR. SWEGMAN: Right.

13 THE COURT: It is certainly relevant to what I do
14 next with regards with conditional certification even if it
15 is just the means of it.

16 MR. SWEGMAN: Well, my concern is that as I said
17 before, probably 60 or more percent of the people who
18 received this envelope never opened it. They have no -- I
19 mean, because of the way it is handled which is completely
20 different than a court sponsored notice, we are going to be
21 giving them the names of people who have no clue for the most
22 part what they may be talking about and I am not sure what
23 they are going to use those names for.

24 I mean, they have indicated that they may use them
25 in a motion to preclude additional notice to be sent to these

1 people and you have indicated that that is a question down
2 the road and certainly it is. But there is certain I guess
3 privacy concerns that these people -- I am not sure what they
4 are going to do with the information --

5 THE COURT: Hold on --

6 MR. SWEGMAN: I know, it is -- we opened it up when
7 we sent the letters out.

8 THE COURT: Right. And that is the thing. Like
9 advertisement by definition is very not private. It is very
10 public. So obtaining the names. Sending out the notices.
11 Is all about disclosure and I am not quite sure a disclosure
12 to the defendants own employees you know, maybe the
13 defendants would be asking that question to you which is
14 well --

15 MR. SWEGMAN: I understand that. But I am not sure
16 at this point and maybe it would be appropriate to get a
17 proffer what the defendants would be doing with the names
18 other than making a motion with respect to redundancy on the
19 Court approved notice?

20 THE COURT: Well, I am happy to hear -- I am going
21 to at some point I certainly will turn to Ms. Johnson, but
22 you know, I can tell you already that I can think of lots of
23 ways in which knowing whether an individual down the road
24 received the solicitation could be relevant.

25 MR. SWEGMAN: To?

1 THE COURT: Well, not only class certifications but
2 merits. I mean, heck, if I had someone in the chair as a
3 deponent, as a named plaintiff, and I wanted to know how they
4 were going to take on their duties as a named plaintiff in a
5 putative class, I would want to know how they got there? And
6 secondarily if a class plaintiff you know, I learned of that
7 person's involvement in this case and I learned of it through
8 this letter versus through a court ordered disclosure, I
9 might have some questions about how they tilt and why?

10 You know, what their particular biases might be
11 simply because they received this letter. And there is lots
12 of ways that -- I am not here to do the defendant's job but
13 you know, any time a witness/party receives information about
14 the law suit it is indeed fair game unless it is
15 attorney/client privilege. And this is not that yet.

16 So that is why I am -- I mean, I have been there.
17 I have been there. I have been defending plaintiffs who
18 learn about a case at a town meeting or at a collective you
19 know, a group thing about a particular problem facing our
20 community. And they get asked about it and it is fair.
21 Because it goes to bias. There may not be any.

22 But that is why I am getting -- I am having a hard
23 time when we are talking about conditional certification and
24 not seeing the relevance but let me turn to Ms. Johnson. Can
25 you give us succinct proper beyond what you have already

1 written about why you wish to proceed on?

2 MS. JOHNSON: Yes, Your Honor. And I should note
3 that I would also like to see -- I am sure of the
4 technological issues but I have not been able to find the
5 website and I have not seen the envelope that I understand
6 was sent this morning. But with respect to your question,
7 Your Honor, I -- you have said much of what I would have
8 said.

9 But I want to make the point that with respect to
10 the letter itself, just because plaintiffs chose to only tell
11 their side of the story and not send a balance notice with
12 their consent to join --- does not mean it does not
13 constitute notice of this lawsuit. And a consent form that
14 could operate to last on the opt in.

15 Plaintiffs' counsel have acknowledged in their
16 communications with us that one of their two opt in
17 plaintiffs, Ms. Danielle Tucker received notice of the
18 lawsuit and chose to join through this very letter. I am
19 also wondering if there are other letters that have been
20 sent. I have heard that there might have been a letter that
21 was sent prior to this one.

22 So I don't even believe that this is the only
23 letter that was issued about this lawsuit. And I want to
24 know about all of those notices and you are right, Your
25 Honor, I want to know if people who had no intention of suing

1 ALDI but were short on cash and got something in the mail
2 that maybe said, "Hey join this lawsuit and you will get
3 money." I would like to know if that is the case. I would
4 like to know if those types of communications occur.

5 I would like to know with what bias people are
6 joining the lawsuit. And I also would like to know if the
7 notice has already gone to thousands of people, why a second
8 notice would be necessary? We would argue obviously in our
9 opposition to conditional certification all the reasons that
10 we believe that the people are not similarly situated to the
11 named plaintiff in this case.

12 But even if Your Honor determines that they are, we
13 also believe that if this notice has already been
14 disseminated broadly that there is really no point in sending
15 another one. Just because --- bias, doesn't mean it is not
16 notice.

17 THE COURT: And I may disagree with you on that but
18 I credit that knowing what was said and to who may affect the
19 question of notice. If I find that the class is similarly
20 situated and now we are talking about what is this notice
21 going to look like? It is relevant to that analysis, even if
22 in the end doesn't change what we do. Does that make sense,
23 Ms. Johnson?

24 MS. JOHNSON: Yes, Your Honor.

25 THE COURT: All right --

1 MR. SWEGMAN: Your Honor?

2 THE COURT: Yes?

3 MR. SWEGMAN: George Swegman again. Let me just
4 propose this. It sounds as if the concerns might be met by
5 letting defendants know all of the people who responded to
6 this particular letter. Now there was --

7 THE COURT: No, that doesn't -- nope, I am not
8 persuaded. I have to tell you this -- a response is not
9 meeting the question at hand. Document request number 1
10 requests "All documents concerning your communications with
11 those who you contend are similarity situated to you, this
12 specifically includes but is not limited to communications
13 like the one attached at Exhibit A, that your attorney sent
14 on your behalf in this case."

15 I am going to grant that request. You have to
16 disclose not only A but any other similar letters. Those
17 would be the documents concerning communication. Then with
18 regards to interrogatory number 4, "Identify all persons to
19 whom communications about this lawsuit have been sent by you,
20 which includes by your counsel" and --

21 MR. SWEGMAN: Right.

22 THE COURT: -- that again is at A or any
23 communication like A. And that includes social media which
24 would be your website except I can't find any evidence that
25 on the --

1 MR. SWEGMAN: Exactly. And I will --

2 THE COURT: --- and you all have to get to the
3 bottom of that. So in sum and substance, I am going to grant
4 the -- I am going to say that you have to comply with the
5 ROG(sic) and the RTD. We do this in lieu of formal motions
6 to compel to keep down the costs.

7 MR. SWEGMAN: I understand that.

8 THE COURT: So --

9 MR. SWEGMAN: Let me just get clarification. They
10 are asking for the identity, will that include the address of
11 the persons that were on the list of this mailing?

12 THE COURT: Well, I do think it is -- yes.

13 MR. SWEGMAN: Okay, so there is address --

14 THE COURT: Because I mean, frankly these are all
15 the employees in any event --

16 MR. SWEGMAN: Yes.

17 THE COURT: -- so the extent that --

18 MR. SWEGMAN: Well, no -- I just so that you are
19 certain where everything is, some of them are ALDI employees.
20 Some of them were ALDI employees but are no longer ALDI
21 employees and that is true of most of the plaintiffs, the
22 named plaintiffs in the case. And as I am sure you are
23 aware, people who still work for the company are generally
24 reluctant to get involved in something like this for reasons
25 that are apparent to everyone. But I will provide names and

1 addresses.

2 There was an earlier letter sent. Which is how we
3 got in touch with the original named plaintiffs and that was
4 sent obviously before we filed the lawsuit. It was a pure
5 advertisement and it did not -- well, let me say this. I am
6 not certain but I do not believe it included an opt in form
7 because at the time of the original advertising letter, there
8 was nothing to opt into.

9 Our process --

10 THE COURT: From both sides as well and to the
11 individuals who are either current or former ALDI employees
12 disclosed to whom it was mailed.

13 MR. SWEGMAN: Okay. And are we talking about the
14 initial letter?

15 THE COURT: Yes.

16 MR. SWEGMAN: Before the lawsuit was filed? Or the
17 letter that --

18 THE COURT: And ---

19 MR. SWEGMAN: -- any letters that we have sent out
20 subsequent to the lawsuit?

21 THE COURT: Yes.

22 MR. SWEGMAN: Okay. All right.

23 THE COURT: Yes and the individual names and
24 addresses. And I do wish to make sure that you file on ECF
25 the envelope in this case. I am not going to need to see the

1 other disclosures. You are going to deal with that in
2 discovery with defendants. But you have represented to me
3 that there is an envelope in the mail essentially and I would
4 like it to be put on ECF so that it is --

5 MR. SWEGMAN: My understanding from my law clerk
6 was that that happened last night.

7 THE COURT: Let me look.

8 MR. SWEGMAN: It went out as an e-mail to you and
9 to counsel for the defendants. And it was basically just a
10 short note with copies of the various envelopes because some
11 envelopes were little different than others because
12 jurisdiction has its own requirement. But each of the
13 envelopes indicates advertisement on the front of it.

14 THE COURT: Okay so let me do this. Let me check
15 because you are saying that you believe that your paralegal
16 filed it on ECF?

17 MR. SWEGMAN: I believe -- we file everything that
18 way these days I guess.

19 THE COURT: Yes. Let me check. I don't think I
20 saw it and if I didn't, I want you to know that so that you
21 can refile. There is nothing filed as of -- the latest
22 filing was 3/29 and I believe that was your -- that was me
23 saying we are having a scheduling conference or a recorded
24 conference. So we have received nothing on ECF regarding the
25 envelopes.

1 MR. SWEGMAN: Okay. All right. I will make sure
2 that it happens today. And we will put together the list
3 that you are requesting and try and get that out tomorrow.
4 And I will try and find out and let both of you know what the
5 story is on our website and why this lawsuit doesn't appear
6 there. Because God knows, that is the whole reason to have a
7 website and I simply can't explain why it is not easily
8 accessed on that website.

9 MS. JOHNSON: Your Honor?

10 THE COURT: Yes?

11 MS. JOHNSON: This is counsel for defendant, Louisa
12 Johnson. I would submit that I would rather -- to your
13 point, this was supposed to be your call on whether notice
14 should be sent and so I am not advocating that the website be
15 corrected to repost information about the lawsuit at this
16 time. I don't want that.

17 THE COURT: Well, I understand that. I understand
18 that. Neither -- I am not taking a position on it, I am just
19 saying that the letter right now isn't -- using the word
20 misleading is too strong. It doesn't proport to say what in
21 fact it is -- is acceptable on line. And it came to my
22 attention because I wanted to see whether a receiving of this
23 letter would see if they followed the bouncing ball.

24 It seemed important to let you all know that but
25 yes I take no position as to whether you should repost.

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1 MR. SWEGMAN: And obviously when we sent this
2 letter out, someone assumed or understood that it was on our
3 website, otherwise we would not have made that suggestion
4 that they look at it. So I will try and find out what the
5 story is.

6 THE COURT: Okay, all right. Thank you all. I am
7 going to grant the defendant's request and hopefully that
8 will keep the trains moving for you all. Okay?

9 MR. SWEGMAN: Very good.

10 THE COURT: All right. Thank you.

11 MR. SWEGMAN: Thank you for your time, Your Honor.

12 THE COURT: Okay, you take care.

13 MR. SWEGMAN: Ms. Johnson, take care.

14 MS. JOHNSON: Yes, you too.

15 MR. SWEGMAN: Bye, bye.

16 MS. JOHNSON: Bye.

17 (Whereupon, at 10:27 a.m., the telephone conference
18 concluded.)

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C E R T I F I C A T E

I certify that the foregoing is correct transcript
from the electronic sound recording of the proceedings in the
above-entitled matter.

Lisa N. Contreras 4/23/2019
Lisa N. Contreras Date
Certified Transcriber
Certificate No.: CET**D-474